In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1238

JAMES H. RUSH AND ALFRED J. DENNIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (C.A.R. 1–7;[1] Pet. App. 8–14) is not yet reported. The opinion of the district court (R. 57–66) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1967 (C.A.R. 8; Pet. App. 15–16). A petition for rehearing was denied on February 7, 1967 (C.A.R. 10–16). On March 7, 1967, Mr. Justice White extended the time for filing a petition for a writ of certiorari to April 8, 1967. The petition was

[1] "C.A.R." refers to the record in the court of appeals; "R." refers to the record in the district court.

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filed on April 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, as a matter of law, petitioners were entrapped into dispensing drugs without authorization of a prescribing physician.

STATEMENT

After a trial before the United States District Court for the District of Nebraska, petitioner Rush was convicted on five counts, and petitioner Dennis (a pharmacist employed by Rush) on two counts, of an information charging the dispensing of drugs without authorization of the prescriber or without a prescription, in violation of 21 U.S.C. 353(b)(1) and 21 U.S.C. 331(k) (R. 1–5, 57–66). On January 18, 1966, Rush was sentenced to pay a fine of $250 on each of the five counts (a total fine of $1,250), the imposition of further sentence was suspended, and he was placed on probation for two years. Dennis was fined $100 on each count (a total of $200) and placed on probation for two years (R. 69–71). On appeal the convictions were affirmed (C.A.R. 8; Pet. App. 15–16).

The evidence showed that from March through May 1960 one Rice, an inspector for the United States Food and Drug Administration, engaged in an investigation of drug sales made at Rush's pharmacy at Ralston, Nebraska (Tr. 4–5),[2] having been authorized

[2] "Tr." refers to the trial transcript of the first jury trial on February 21, 1962. A new trial had been granted after the defendants were found guilty (Tr. 45–52). It was stipulated that the trial transcript of the first trial and the exhibits in-

to do so after receiving a complaint as to Rush's operation of his business (Tr. 28–29). Rice and Inspector Bryant, for the purposes of the investigation, obtained from a Dr. Dewey two prescriptions, one for chloral hydrate capsules and the other for dexedrine sulfate pills (Tr. 6–7, 48–49, 75–77).

On April 19, 1960, the prescription for dexedrine sulfate tablets was presented by Bryant at Rush's pharmacy and filled by Dennis (Tr. 48–50). On April 22, Bryant had the prescription refilled by Dennis, who did not obtain the authorization of Dr. Dewey (Tr. 51–52, 76, 79). Dennis testified that Bryant told him that his physician had requested that the prescription be refilled and that he, Dennis, believed this statement (Tr. 145). The tablets issued on April 19, if taken according to directions, would have lasted 24 days (Tr. 146). On May 2, Bryant asked for a double refill so he would not have to come back so often (Tr. 54), and Dennis furnished the double dosage without authorization (Tr. 53–54, 78–79). Dennis testified that Bryant said his doctor wanted the medication continued, and that since Bryant was to be out of town for a long time he wanted the double dosage (Tr. 146).

On March 21, 1960, Rice had the prescription for the chloral hydrate filled by Rush (Tr. 7). When Rice returned on April 23 he asked for a double refill of the prescription, which Rush gave him without Dr. Dewey's authorization (Tr. 9–11, 77, 79). Rush testi-

troduced there could be used at the second trial (R. 85(2), 85(3)), which resulted in the convictions petitioners seek to have reviewed.

fied that Rice represented that the doctor had told him to get a refill (Tr. 112). On April 23, Rush also sold Rice two dozen dexedrine tablets for his wife without any mention of a prescription (Tr. 9, 11). Rush's testimony was that Rice said his wife had a prescription at home and that he "just wanted a few to hold him until he got back to town" (Tr. 114–115).

On May 5, Bryant returned to the pharmacy, gave Rush the original prescription vial, and asked for a double refill of the chloral hydrate. Rush refilled the prescription (Tr. 57–58). Rush testified that Bryant said he wanted a refill since the "doctor said to keep on taking them" (Tr. 116).

Rush testified that prior to May 5, 1960, he never refilled a prescription for either dexedrine sulfate or chloral hydrate without checking with the doctor (Tr. 135). In rebuttal (Tr. 186b), the court permitted Rice to testify that Rush had refilled a prescription without the physician's authorization on March 30 and on April 13, 1960 (Tr. 185–186a, 189–190), and that Dennis had done so on April 7, 1960 (Tr. 187–188).

ARGUMENT

There is no substance to petitioners' contention that they were entrapped as a matter of law. Entrapment occurs only when criminal conduct is "the product of the *creative* activity" of law enforcement officials. *Sherman* v. *United States,* 356 U.S. 369, 372. Here petitioners made all of the illegal sales immediately and without importuning by the agents. As the trial court observed: "Even by the defendants' testimony

there was no inordinate * * * inducement, but merely assertions that the prescribing physician desired the continuation of the medication" (R. 64).

There is no requirement that there be "independent reasonable grounds" (Pet. 7) before government agents may approach possible law violators in an investigation of criminal activity. In any event, it was only after a complaint as to Rush's activities had been made that the investigation here was begun. Upon the entire record the district court, as fact-finder, properly found that there had been no entrapment. See, *e.g., Masciale* v. *United States,* 356 U.S. 386.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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